

ANN BAVENDER*
ANNE GOODWIN CRUMP
VINCENT J. CURTIS, JR.
RICHARD J. ESTEVEZ
PAUL J. FELDMAN
ROBERT N. FELGAR*
ERIC FISHMAN
RICHARD HILDRETH
FRANK R. JAZZO
ANDREW S. KERSTING
EUGENE M. LAWSON, JR.
HARRY C. MARTIN
GEORGE PETRUTSAS
LEONARD R. RAISH
JAMES P. RILEY
KATHLEEN VICTORY
HOWARD M. WEISS
* NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW
11th FLOOR, 1300 NORTH 17th STREET
ARLINGTON, VIRGINIA 22209-3801

(703) 812-0400

TELECOPIER

(703) 812-0486

INTERNET

www.fhh-telcomlaw.com

FRANK U. FLETCHER
(1939-1985)
ROBERT L. HEALD
(1956-1983)
PAUL D. P. SPEARMAN
(1936-1962)
FRANK ROBERSON
(1936-1961)
RUSSELL ROWELL
(1948-1977)

RETIRED
EDWARD F. KENEHAN

CONSULTANT FOR INTERNATIONAL AND
INTERGOVERNMENTAL AFFAIRS
SHELDON J. KRYN
U. S. AMBASSADOR (ret.)

OF COUNSEL
EDWARD A. CAINE*
MITCHELL LAZARUS*
EDWARD S. O'NEILL*
JOHN JOSEPH SMITH

WRITER'S DIRECT

812-0474

kersting@fhh-telcomlaw.com

December 4, 1998

BY HAND DELIVERY

Magalie R. Salas, Esquire
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

RECEIVED

DEC - 4 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

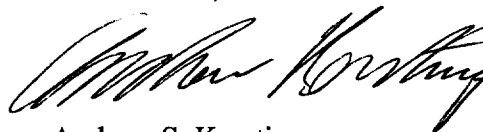
Re: MM Docket No. 98-93
Reply Comments
D. Mitchell Self Broadcasting, Inc.

Dear Ms. Salas:

Transmitted herewith on behalf of D. Mitchell Self Broadcasting, Inc., are and original and four copies of its Reply Comments in the above-referenced rulemaking proceeding. These comments are being submitted in connection with the Commission's *Notice of Proposed Rule Making*, FCC 98-117 (released June 15, 1998).

Should any questions arise concerning this matter, please communicate directly with this office.

Very truly yours,
FLETCHER, HEALD & HILDRETH, P.L.C.



Andrew S. Kersting
Counsel for D. Mitchell Self Broadcasting, Inc.

Enclosure

cc (w/ encl.): Certificate of Service (by hand & first-class mail)

No. of Copies rec'd 014
List ABCDE

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED

DEC - 4 1998

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)
)
1998 Biennial Regulatory Review --) MM Docket No. 98-93
Streamlining of Radio Technical Rules in)
Parts 73 and 74 of the Commission's Rules)
)
To: The Commission)

REPLY COMMENTS

D. Mitchell Self Broadcasting, Inc. ("Self"), hereby submits these reply comments in connection with the Commission's *Notice of Proposed Rule Making and Order*, FCC 98-117 (released June 15, 1998) ("*NPRM*"), in the above-captioned proceeding.

I. Background.

Big River Broadcasting Corp. ("Big River"), licensee of Stations WSBM(AM), WQLT(FM), and WXFL(FM), Florence, Alabama, filed comments in this proceeding in support of the Commission's proposal to modify Section 73.3517 of the Commission's rules to permit the filing of contingent minor change FM applications on a limited basis. *See NPRM*, at ¶13. In its comments, Big River notes that it currently has pending before the Commission an application for review of a decision by the Mass Media Bureau ("Bureau") dismissing two one-step upgrade applications as being contingent applications in violation of Section 73.3517 of the rules. Big River Comments, p. 2.

As stated in Big River's comments, Big River and H-M-S Broadcasting Co. ("H-M-S") tendered three interrelated one-step applications to the FCC on March 22, 1996. The first application

in the group, filed by Big River, sought to downgrade Station WQLT from Channel 297C to Channel 297C1 at its licensed transmitter site (File No. BPH-960322ID). H-M-S filed a one-step application proposing to change the frequency of Station WDXE-FM, Lawrenceburg, Tennessee, from Channel 240A to Channel 294A (File No. BPH-960322IB). By moving to Channel 294A, WDXE-FM would be able to increase its power from 3 kw to 6 kw at the station's licensed transmitter site. The third one-step application in the group, also filed by Big River, sought to upgrade Station WXFL from Channel 241A to Channel 241C2 at a new transmitter site (File No. BPH-960322IF). Big River Comments, p. 3.

At the time that Big River and H-M-S filed their respective applications, Self was the licensee of Stations WSHK-FM, Russellville, Alabama, and WLAY(AM)/-FM, Muscle Shoals, Alabama, which compete for listeners and advertising revenue with Big River's stations.¹ Self filed an informal objection to the WDXE-FM and WXFL applications on June 26, 1996, contending that both were contingent applications in violation of Section 73.3517 of the rules. Also on June 26, 1996, Self filed a petition for rulemaking seeking the allotment of Channel 294A at Pulaski, Tennessee.²

By letter dated, November 26, 1996, (Reply ref: 1800B3-DEB/PHD), the Bureau determined that the WDXE-FM and WXFL "one-step" applications were contingent in violation of Section 73.3517 of the rules, and, thus, were inadvertently accepted for filing. Accordingly, the WDXE-FM

¹ Self assigned Stations WSHK(FM) and WLAY(AM)/-FM to U.S. South Broadcasting Company, Inc. (File Nos. BAL-971121GG; BALH-971121GH; BALH-971121GI), on February 20, 1998.

² U.S. South Broadcasting Company, Inc. also is the successor-in-interest to Self's Pulaski rulemaking petition. *See* Letter dated February 23, 1998, from Harry C. Martin to Magalie Salas, Esquire.

and WXFL applications were dismissed. Big River and H-M-S filed a petition for reconsideration of the dismissal of their respective applications on December 17, 1996, in which they, for the first time, requested a waiver of the contingent application rule. By letter dated June 27, 1997 (Reply ref: 1800B3-DK), the Bureau denied reconsideration and affirmed its earlier decision. The June 27, 1997, letter ruling also stated that the applicants' request for waiver of the contingent application rule on reconsideration was untimely.

In an effort to support its pending application for review, Big River filed comments in this rulemaking proceeding in support of the Commission's proposal to permit the filing of contingent FM applications. Big River claims that its contingent application proposal would result in more than 193,000 persons in Alabama and Tennessee receiving an "improved [radio] service." Big River Comments, p. 6. Big River also claims that its proposal would not preclude any competing allotment or application proposals because "if the [Big River and H-M-S] applications were not granted as a package, then WQLT(FM) would remain a full Class C station." *Id.* (footnote omitted).

II. The FCC's Proposal to Permit the Filing of Contingent Applications Is Inconsistent With Section 307(b) of the Communications Act and the FM Allotment Priorities.

Section 307(b) of the Communications Act of 1934, as amended, requires the Commission to "provide a fair, efficient and equitable distribution" of broadcast stations among the various states and communities. 47 CFR §307(b). *See National Broadcasting Co. v. U.S.*, 319 U.S. 190, 217 (1943) (describing a goal of the Communications Act to "secure the maximum benefits of radio to all the people of the United States"); *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358, 359-62 (1955) (describing a goal of Section 307(b) to "secure local means of expression").

As stated above, Big River claims that its contingent application proposal would not preclude the filing of competing proposals because Big River will not implement the downgrade of Station WQLT from Channel 297C to Channel 297C1 unless it is assured that the WDXE-FM and WXFL one-step upgrade applications will be granted. Big River's position is disingenuous, however, because it fails to understand that the first step in its proposal -- the downgrade of WQLT from Channel 297C to Channel 297C1, which is a necessary prerequisite to the WDXE-FM and WXFL upgrade proposals -- creates an opportunity for the proposed allotment of Channel 294A at Pulaski, Tennessee. The allotment of Channel 294A at Pulaski would provide the community with its first competitive FM service. Moreover, although Big River claims that its proposal would provide "improved service" to more than 193,000 persons, the commencement of a new service at Pulaski would better serve the objectives of Section 307(b) and the fourth FM allotment priority than would the improvement of the existing services of Stations WDXE-FM and WXFL.³ See *Andulusia, Alabama*, 49 *Fed.Reg.* 32201 (August 13, 1984).

Furthermore, if the Commission were to adopt its proposal and accept contingent FM applications such as Big River's, the new rule also has the potential to preclude allotment proposals that would provide a first local service to many communities. The preclusion of such first local service proposals would be inconsistent with the objectives of Section 307(b) and the third FM allotment priority.

³ See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 91 (1982). The criteria for determining the comparative preferability of a proposed FM allotment are (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. *Id.* at 91.

Finally, the contingent application proposal should not be adopted because, by precluding the filing of competing allotment and application proposals, it also will violate the spirit of *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

III. In the Unlikely Event that the Commission Elects to Adopt the Contingent Application Proposal, the New Rule Should Not Apply to Pending Applications Such as Big River's, Which Were Filed in Violation of the Commission's Existing Contingent Application Rule Without a Timely Waiver Request.

As reflected in its comments, Big River did not file its comments in support of the contingent application proposal because it believes that the proposal would serve the public interest. On the contrary, Big River filed its comments for the sole purpose of promoting its purely private interest in attempting to obtain a grant of its pending application for review through the adoption of the contingent application proposal.⁴ Nevertheless, even assuming, *arguendo*, that the Commission elects to adopt the contingent application proposal, the new rule should not apply to pending applications such as Big River's, which were filed in violation of Section 73.3517 of the rules, and without the requisite waiver request.

It is well established that retroactive application of new rules is generally disfavored. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). In determining whether newly adopted rules should be applied retroactively, reviewing courts have routinely found that the grave inequities which often accompany retroactive application significantly outweigh any conflicting regulatory interests. *See Retail, Wholesale and Department Store v. N.L.R.B.*, 466 F.2d 380, 389-90 (D.C. Cir. 1972), citing *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

⁴ Big River stated: "Adoption of this amendment will permit the reinstatement, processing and grant of the dismissed applications." Big River Comments, p. 2.

With respect to Big River's and H-M-S's contingent applications, Self was responsible for bringing the rule violations to the Commission's attention. Following the filing of Self's June 26, 1996, informal objection, the Bureau determined that the WDXE-FM and WXFL one-step upgrade applications had been inadvertently accepted for filing.⁵ That decision was affirmed on reconsideration,⁶ and, as indicated above, is now pending review by the full Commission. Moreover, as a result of the allotment opportunity created by WQLT's downgrade application, Self also filed a rulemaking petition seeking the allotment of Channel 294A at Pulaski, Tennessee, which would provide the community of Pulaski with its first competitive FM service. Self intends to file an application for the Channel 294A facility at Pulaski if its proposal is ultimately adopted. Thus, Self has expended considerable time and resources in reliance on the Commission's existing contingent application rule, and would be substantially prejudiced if the proposed contingent application rule were to be applied retroactively.

On the other hand, Big River has failed to show that it would be prejudiced in any way if it were required to refile its contingent application proposal in accordance with the Commission's proposed new rule. As the Bureau properly found, Big River's and H-M-S's contingent applications were filed in violation of Section 73.3517 of the Commission's rules without any waiver request. Retroactive application of the proposed new rule to these contingent applications would result in the unjust enrichment of two Commission licensees who deliberately filed their contingent applications in violation of the Commission's existing rules. Therefore, because the retroactive application of


⁵ See Letter dated November 26, 1996 (reply ref: 1800B3-DEB/PHD), from Peter H. Doyle to Frank Jazzo, Esquire, *et al.*

⁶ See Letter dated June 27, 1997 (reply ref: 1800B3-DK), from Peter H. Doyle to Leonard S. Joyce, Esquire, *et al.*

the proposed new contingent application rule would result in grave inequities and prejudice licensees such as Self, which relied on the Commission's existing rule, the proposed new rule, if adopted, should not be applied retroactively.

Respectfully submitted,

D. MITCHELL SELF BROADCASTING, INC.

By: 
Frank R. Jazzo
Andrew S. Kersting

Its Counsel

Fletcher, Heald & Hildreth, P.L.C.
1300 N. Seventeenth Street, 11th Floor
Arlington, Virginia 22209
(703) 812-0400

December 4, 1998

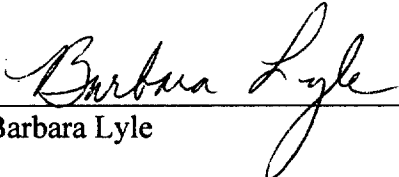
c:\ask...jazzo\self\rm\streamln.rep

CERTIFICATE OF SERVICE

I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 4th day of December, 1998, copies of the foregoing "Reply Comments" were hand-delivered or mailed first-class, postage prepaid, to the following:

Peter H. Doyle, Assistant Chief *
Audio Services Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 302
Washington, DC 20554

Harold K. McCombs, Jr., Esquire
Dickstein Shapiro Morin & Oshinsky, L.L.P.
2101 L Street, N.W.
Washington, DC 20037-1526
(Counsel for Big River Broadcasting Corp.)



Barbara Lyle

* Hand Delivered